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No. 05-

IN THE

Supreme Court of the United States

MARINE MECHANICAL CORPORATION,

Petitioner,

v.

JOHN T. EASTMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals improperly determined that the District Court lacked federal question jurisdiction over Respondent's cause of action for wrongful discharge in violation of public policy premised solely upon federal statutes.

CORPORATE DISCLOSURE STATEMENT

Marine Mechanical Corporation does not have a parent corporation and no publicly held company owns 10% or more of Marine Mechanical Corporation's stock.

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OPINION BELOW

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on February 15, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 1331, which provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

The following statutory provisions also are involved in this case: 18 U.S.C. § 287 and 31 U.S.C. §§ 3729 and 3730(h). Due to their length, pertinent portions of these provisions are reprinted in the Appendix. *See* Appendix C.

STATEMENT OF THE CASE

Petitioner Marine Mechanical Corporation ("MMC" or the "Company") operates a facility in Cleveland, Ohio, where it manufactures control rod drive mechanisms that are used in naval nuclear propulsion systems. The Company is the sole source supplier of these mechanisms to a customer that contracts directly with the United States Navy. Respondent John Eastman ("Eastman") formerly worked for MMC in the Company's Materials Engineering Department.

In November 2000, MMC implemented a new organizational structure in the Materials Engineering Department. As a result of this reorganization, Eastman began reporting to Mark Centa, an individual Eastman had supervised some years earlier. Upon learning of these changes, Eastman demanded a meeting with MMC's Vice President of Strategic Planning. According to Eastman, during this meeting he learned that he had not been selected for the supervisory position given to Mr. Centa due to concerns regarding Eastman's ability to support production schedules.

Not long after these organizational changes, in February 2001, Eastman prepared a memorandum that he captioned "Support of Production Schedules." In the memorandum, Eastman detailed mistakes allegedly made by others, primarily Mr. Centa. While it would not have been out of the ordinary for Eastman to raise issues concerning process and quality improvements, his memorandum contained unusual focus upon Mr. Centa, his competition for the supervisory position, and sought to compare Mr. Centa's performance to his own.

The Company conducted an exhaustive investigation of Eastman's assertions. At the conclusion of the investigation, the Company determined that Eastman's allegations lacked merit and that he had improperly sought to discredit others, particularly Mr. Centa. As a result, MMC issued Eastman a written warning on February 27, 2001.

Approximately four months later, Eastman prepared another memorandum purporting to respond to his disciplinary warning. Eastman sought to revisit his prior allegations and made further attacks against Mr. Centa. Once

again, MMC conducted a very thorough investigation and again determined that Eastman's allegations lacked merit and were meant to discredit others, particularly his supervisor, Mr. Centa. MMC terminated Eastman's employment on September 27, 2001, as a result of his violation of the February 2001 written warning.

Eastman filed his Complaint in the Cuyahoga County Court of Common Pleas on May 30, 2002, alleging a single cause of action for wrongful discharge in violation of public policy. Eastman alleged that MMC terminated his employment due to his alleged complaints about the quality of MMC's parts supplied to the United States Navy and MMC's alleged submission of claims for payment for these parts "in violation of federal law." Eastman premised his wrongful discharge claim solely upon two federal statutes, 18 U.S.C. § 287 and 31 U.S.C. § 3729.

MMC timely removed the action to the United States District Court for the Northern District of Ohio on the basis of federal question jurisdiction. On August 6, 2002, Eastman filed with the District Court a Motion to Remand. In a further effort to defeat jurisdiction, Eastman contemporaneously filed with the District Court his First Amended Complaint, alleging for the first time alternate state law bases of public policy in support of his wrongful discharge cause of action. On September 10, 2002, the District Court denied Eastman's Motion to Remand. Eastman filed a second motion seeking remand on September 2, 2003, which the District Court denied on September 18, 2003.

After the parties conducted substantial discovery, MMC filed with the District Court its Motion for Summary Judgment, seeking the dismissal of Eastman's claim. On

October 21, 2003, the District Court issued its Memorandum Opinion and Order, granting MMC's Motion for Summary Judgment. Appendix B. On November 19, 2003, Eastman filed his Notice of Appeal, appealing the District Court's grant of summary judgment in favor of MMC and the District Court's determination that it had federal question jurisdiction over the matter.

In an opinion filed on February 15, 2006, the Sixth Circuit vacated the District Court's judgment and reversed the orders denying Eastman's motions to remand. The Court of Appeals determined that Eastman's claim for wrongful discharge in violation of federal public policy did "not present a substantial federal question over which federal courts may exercise 'arising under' jurisdiction under 28 U.S.C. §1331." Appendix A at 8.

This Petition seeks review of the Court of Appeals' holding that the District Court lacked subject matter jurisdiction to adjudicate the claim.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit misapplied this Court's precedent and thereby left to the state court a substantial question of federal law. More specifically, the Sixth Circuit's opinion is contrary to this Court's recent holding in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 125 S. Ct. 2363 (2005), and inconsistent with the guidance of *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986).

This Court has long recognized that federal question jurisdiction exists where a claim requires the resolution of a substantial question of federal law, even if state law creates

the plaintiff's cause of action. Thus, a case may arise under federal law "where the vindication of a right under state law necessarily turn[s] on some construction of federal law. . . ." *Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 9 (1983). As explained by the Court in *Smith v. Kansas City Title & Trust Co.*,

> [t]he general rule is that where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction under this provision.

255 U.S. 180, 199 (1921).

Eastman's initial complaint in this case, which provided the basis for removal, presented a direct and substantial question of federal law. Although he utilized the vehicle of a state law cause of action, Eastman alleged that MMC terminated his employment in violation of the public policy manifested in two *federal* statutes – a federal criminal provision related to the presentment of false claims to the United States military or Navy, 18 U.S.C. §287, and the federal False Claims Act, 31 U.S.C. §3729 (the "FCA"). In order to prove his wrongful discharge claim, Eastman had to demonstrate that MMC's alleged actions actually violated the statutes upon which he premised his claim. *See, e.g., Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 568-579 (6th Cir. 2003) (under Ohio law, proof of a claim for wrongful discharge in violation of public policy requires the plaintiff to demonstrate a violation of the underlying statute or other

relied upon source of public policy). Having alleged no state law bases of public policy in support of his claim, Eastman could only prove his claim by showing a violation of these federal statutes.

In the recent case of *Grable & Sons Metal Prods., Inc. v. Darue Engineering & Mfg.*, this Court examined a highly analogous situation involving the removal of a state law quiet-title action that required the interpretation of federal tax law. 125 S. Ct. at 2366. This Court found that Grable's state law claim "warrant[ed] federal jurisdiction" because it placed directly at issue the interpretation of a federal statute:

> Whether Grable was given notice within the meaning of the federal statute is thus an essential element of its quiet title claim, and the meaning of the federal statute is actually in dispute; it appears to be the only legal or factual issue contested in the case. The meaning of the federal tax provision is an important issue of federal law that sensibly belongs in federal court.

Id. at 2368. Similarly, in the present case, Eastman's wrongful discharge claim as plead in his initial Complaint required that he establish a violation of federal statutory law. In other words, the case turned on the question of whether MMC had violated these provisions through its discharge of Eastman. As in *Grable*, the meanings of the federal statutes relied upon by Eastman were "an essential element" of his cause of action.

The present case actually presents a much stronger basis for the exercise of federal jurisdiction than did *Grable*. In this case, the primary federal statute upon which Eastman

sought to rely, the FCA, contains a private remedy designed to address allegations precisely like Eastman's. The FCA's anti-retaliation provision provides "any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against" with "all relief necessary to make the employee whole." 31 U.S.C. §3730(h).

The presence of a private cause of action in the FCA is extremely significant in considering the existence of subject matter jurisdiction in this case. In *Merrell Dow*, this Court recognized that Congress' provision of a private federal remedy is an important indication of the intent to have federal courts examine the federal question at issue. Indeed, in *Merrell Dow*, Congress' failure to provide a private remedy for violations of the federal Food, Drug, and Cosmetic Act was determinative to this Court's holding:

> We conclude that a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. 1331.

478 U.S. at 817.

In *Grable*, this Court characterized the presence of a private cause of action as a "welcome mat" to the federal courts. 125 S. Ct. at 2370. While the absence of a federal remedy was not dispositive of the jurisdictional question in *Grable*, it certainly was the strongest argument against federal jurisdiction.

In seeking to harmonize its opinion with the holding in *Merrell Dow*, the Court of Appeals in this case inexplicably determined that Eastman did not have a private right of action under the FCA. Appendix A at 6. This statement is all the more puzzling in light of the fact that the Court of Appeals cited directly to the pertinent non-retaliation provision contained in the FCA. *Id.* This error led the Court of Appeals to conclude that *Merrell Dow* supported its determination that the District Court lacked jurisdiction. To the contrary, *Merrell Dow* demonstrates that Eastman's claim presented a federal question.

Also incorrect was the Court of Appeals' determination that "the meaning of the two statutes cited by [Eastman] is not in serious dispute in this case." *Id.* As in *Grable*, Eastman placed the interpretation of the cited federal statutes directly at issue, and he could not make out a claim for wrongful discharge without first establishing a statutory violation. The Court of Appeals' statement that MMC did not dispute the prohibitions contained in the applicable federal laws misses the point. MMC absolutely disputed Eastman's assertions that the Company's actions violated these statutes, and this presented a substantial dispute between the parties requiring the interpretation of these federal laws. *See Grable*, 125 S. Ct. at 2368 ("Whether Grable was given notice within the meaning of the federal statute is thus an essential element of its quiet title claim, and the meaning of the federal statute is actually in dispute; it appears to be the only legal or factual issue contested in the case").

Finally, the Court of Appeals' conclusory determination that a finding of subject matter jurisdiction in this case would somehow open the floodgates for the removal of state law employment litigation claims into federal court is

unsupported and insufficient to defeat jurisdiction in light of this Court's guidance in *Grable* and *Merrell Dow*. This case presented a unique scenario in which a plaintiff sought to premise his wrongful discharge cause of action *solely* upon federal statutes. Had Eastman initially cited to any state law basis of public policy, the case would not have presented a federal question. *See Long v. Bando Mfg. of America, Inc.*, 201 F.3d 754, 760 (6th Cir. 2000) (remanding a wrongful discharge cause of action where the plaintiff had alleged alternate state law bases of public policy and holding "that there is no federal question jurisdiction when the complaint on its face states alternate theories supporting a state-law claim, at least one of which does not involve a federal question"). Indeed, it is noteworthy that upon MMC's removal of the action Eastman immediately amended his complaint and was able to add various, alternate state law bases of public policy in support of his claim.

Eastman's claim also was unique because it rested upon the meaning of a federal law, the FCA, which provided a private remedy to address allegations just like Eastman's. This "welcome mat" to the federal courts was all but ignored by the Court of Appeals and outweighs the speculative concerns of increased employment litigation in the federal courts. At the very least, the Court of Appeals failed to follow this Court's instructions from *Grable* and conduct a meaningful "assessment of any disruptive portent in exercising federal jurisdiction." *Grable*, 124 S. Ct. at 2368.

CONCLUSION

For all the foregoing reasons, Petitioner Marine Mechanical Corporation respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED FEBRUARY 15, 2006

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-4591

JOHN T. EASTMAN,

Plaintiff-Appellant,

v.

MARINE MECHANICAL CORPORATION,

Defendant-Appellee.

Argued: June 7, 2005

Decided and Filed: February 15, 2006

Before: SILER and GIBBONS, Circuit Judges; LAWSON, District Judge.*

OPINION

DAVID M. LAWSON, District Judge. Plaintiff John Eastman appeals from the decision of the district court granting the defendant's motion for summary judgment on

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* The Honorable *David M. Lawson*, United States District Judge for the Eastern District of Michigan, sitting by designation.

an Ohio common-law claim of retaliatory employment discharge in violation of public policy. The complaint, originally filed in an Ohio state court, identified federal law as the source of the public policy violated by the defendant, and it was on that basis that the defendant claimed in its removal notice that the case "[arose] under the Constitution, treaties or laws of the United States," 28 U.S.C. §§ 1331, 1441(b), and thus was "removable without regard to the citizenship or residence of the parties." 28 U.S.C. § 1441(b). We hold, however, that the plaintiff's state-law employment claim alleging wrongful discharge in violation of federal public policy does not raise a substantial federal question over which federal courts may exercise original or removal jurisdiction, because accepting such cases would be "[in]consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331." *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. __, __, 125 S.Ct. 2363, 2367, 162 L.Ed.2d 257 (2005). Because we find that the district court did not have subject matter jurisdiction to adjudicate the claim, we will vacate the district court's judgment and remand with instructions to remand the matter to the state court whence it came.

I.

John T. Eastman, a resident of Ohio, began his employment with TRW, Inc., a corporate predecessor of the defendant, in 1984. He was trained in metallurgy at Case Western Reserve University, and he began in a position as a metallurgical engineer. The defendant, Marine Mechanical Corporation, manufactures component parts for nuclear

reactors used on vessels of the United States Navy. It is an Ohio corporation.

Marine Mechanical's supply contract with the Navy's prime contractor calls for a demanding quality assurance program because the parts face exposure to extreme temperature, pressure, and irradiating conditions and must conform to the Navy's maintenance requirements. All employees must read and sign acknowledgments that they will adhere to Marine Mechanical's quality assurance program by reporting any contractual violations. Marine Mechanical emphasizes its expectations for employee adherence to this obligation in a procedure manual that specifically provides that employees must "bring possible violations of this policy" to a supervisor or officer of the company. J.A. at 198.

Over the last ten years of his employment, Eastman received high performance ratings and significant pay increases from the defendant each year. The defendant praised Eastman in a performance appraisal issued eight months before termination. Eastman advanced to the position of Manager of the Materials Engineering Section.

Eastman alleges, however, that he became a victim of a shift in his employer's business focus because of his steadfast adherence to quality control requirements, while the company turned its priorities toward production schedules and profitability at the expense of quality. On November 3, 2000, he claims Marine Mechanical's president demoted him from Manager of Materials Engineering to Principal Engineer after being informed that the company "wanted to be doing things

faster." Eastman claims that the demotion was precipitated by his refusal to test a part in a way he believed would produce inaccurate results. Marine Mechanical contends the title change resulted from a new organizational structure but acknowledges that the change put Eastman under the supervision of Mark Centa, who previously had worked in a position subservient to Eastman.

On February 9, 2001, Eastman in his new position submitted a written memorandum notifying Marine Mechanical supervisors of quality control deficiencies, which included warnings that a certain process possibly violated Marine Mechanical's contractual obligations, the purchase of substandard fasteners used in products, and the receipt of certain component parts after a vendor inaccurately tested their hardness strength. Marine Mechanical conducted an investigation and concluded that Eastman's notification made unfounded allegations of fraud against Centa, Eastman's supervisor. On February 23, 2001, Eastman submitted a revised memorandum to clarify some unsupported statements made in the earlier memorandum. Marine Mechanical contended that the memoranda only identified problems that caused delay and cost increases and personally attacked Centa. It chastised Eastman with a written "Disciplinary Warning" on February 27, 2001.

Eastman continued in his position as Principal Engineer and regularly raised issues related to product quality as part of his normal duties. He alleges that the company became resistant to his quality control efforts. On July 23, 2001, Eastman submitted a letter responding to the earlier disciplinary warning and raising new product quality issues.

The new letter alleged that others in the company had misrepresented some vendor requirements, failed to ensure accurate testing of a piece of wire, and used an uncertified welder to complete some work. Marine Mechanical says that it thoroughly investigated the allegations, concluded that the quality issues had been identified to the company's customer, and found no evidence of intentional misrepresentations made by employees. Although Eastman insists that his letter represented his attempt to comply with the stated company policies of identifying possible violations of quality control standards by this government contractor, Marine Mechanical determined that Eastman's letter constituted another attempt to discredit other employees.

According to Marine Mechanical, the July 2001 letter amounted to an act of misconduct in the same vein as Eastman's prior transgression in February 2001 for which he received his disciplinary warning. The defendant decided to fire him. Two company officers notified Eastman of the termination on September 27, 2001. When discussing the reasons for the action, the officers stated that Eastman was terminated for making more unfounded and meritless allegations.

On May 30, 2002, Eastman filed a complaint in the Cuyahoga County, Ohio Court of Common Pleas alleging that Marine Mechanical committed a tort under Ohio law by wrongfully firing him in violation of public policy. The public policy Eastman set forth had its source entirely in the federal statutes cited in the complaint. He contended that his expressed concerns over the quality of the parts the defendant was manufacturing as a government contractor caused his

employer to silence him "by first reassigning him and removing his responsibilities for quality control and, ultimately, terminating his employment." Compl. ¶ 9, J.A. at 10. Eastman then alleged:

> 10. There is a clear public policy, manifested in federal statutes and regulations, including but not limited to 18 U.S.C. § 287 and 31 U.S.C. § 3729, prohibiting the submission of false or fraudulent claims to the military or federal government.
>
> 11. By failing to comply with its contractual obligations related to quality control for parts produced pursuant to Marine Mechanical's contracts to produce parts for use by the United States Navy, Marine Mechanical submitted false or fraudulent claims, pursuant to 18 U.S.C. § 287 and 31 U.S.C. § 3729.
>
> 12. Marine Mechanical's decision to discharge Eastman on September 27, 2001 was motivated by . . . Eastman's complaints regarding quality control related to parts produced by Marine Mechanical for use by the United States Navy pursuant to Marine Mechanical's defense contracts and the submission of claims for payment for these parts in violation of federal law.

J.A. at 10. Eastman claimed economic damages in excess of $2 million due to an inability to find employment, and he alleged unspecified non-economic damages as well.

Appendix A

On July 9, 2002, the defendant filed a notice of removal in the United States District Court for the Northern District of Ohio. Four weeks later, Eastman filed a motion to remand and an amended complaint; Marine Mechanical had not yet filed its answer. The amended complaint included citations to Ohio law as additional sources of public policy, to which the plaintiff referred in support of his motion to remand. The amended complaint alleged the following:

> There is a clear public policy, manifested in various state and federal statutes and regulations, including but not limited to O.R.C. 4113.5 (the Ohio Whistleblower statute), O.R.C. 2921.12 (falsification), and 18 U.S.C. § 287 and 31 U.S.C. § 3729, prohibiting the submission of false or fraudulent claims to the military or federal government. Marine Mechanical's conduct also violates the clear public policy manifested in the tort of fraud.

J.A. at 45.

In his remand motion, Eastman argued that a federal question was not well pled in his (amended) complaint because his claim was not based on federal law; rather the claim arose under Ohio law. He also contended that citation to federal statutes as the source of public policy created no compelling federal interest, especially when state statutes are cited as well. The district court denied the motion without a hearing on September 10, 2002 in a marginal entry stating simply that the motion was "[d]enied." J.A. at 74. Approximately one year later, on September 2, 2003, Eastman

filed a suggestion that the district court lacked jurisdiction. Once again, the district court disposed of the issue with a marginal entry, stating, "Motion Denied. Court has determined it has jurisdiction." J.A. at 152.

Following the completion of discovery, Marine Mechanical filed a motion for summary judgment. The district court granted the motion for summary judgment in a memorandum opinion and order that did not address the jurisdiction issue. The court dismissed the case on October 21, 2003. This timely appeal followed.

II.

This court reviews the determination of subject matter jurisdiction *de novo. Caudill v. North Am. Media Corp.*, 200 F.3d 914, 916 (6th Cir.2000). In addition, although the denial of a motion to remand a removed action for want of jurisdiction is not immediately appealable, once the lower court's decision is properly before this court on an appeal of a final judgment, as here, "it is clear from our prior decisions that we review denials of remand motions *de novo.*" *Her Majesty The Queen In Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 338 (6th Cir.1989).

The defendant's removal notice was based on 28 U.S.C. § 1441(b), which, as noted earlier, provides that "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right *arising under* the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties." *Ibid.* (emphasis added). District courts have original

jurisdiction over "actions *arising under* the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (emphasis added). "[B]ecause the 'arising under' language of § 1441(b) is almost identical to the language of 28 U.S.C. § 1331, the scope of removal jurisdiction based on the existence of a federal question under § 1441(b) is considered to be identical to the scope of federal question jurisdiction under § 1331." *Long v. Bando Mfg. of Am., Inc.*, 201 F.3d 754, 757-58 (6th Cir.2000).

The provisions of section 1441(b) require a defendant to demonstrate that a district court would have original jurisdiction over a civil action in order to invoke the federal court's removal jurisdiction. *Id.* at 757. The party seeking removal bears the burden of demonstrating that the district court has original jurisdiction. *Ibid.*; *Conrad v. Robinson*, 871 F.2d 612, 614 (6th Cir.1989). "[B]ecause lack of jurisdiction would make any decree in the case void and the continuation of the litigation in federal court futile, the removal statute should be strictly construed and all doubts resolved in favor of remand." *Brown v. Francis*, 75 F.3d 860, 864-65 (3d Cir.1996); *see also Her Majesty the Queen in Right of the Province of Ontario*, 874 F.2d at 339.

A claim falls within this court's original jurisdiction under 28 U.S.C. § 1331 "only [in] those cases in which a well-pleaded Complaint establishes either that federal law creates the cause of action or that the plaintiff[']s right to relief necessarily depends on resolution of a substantial question of federal law." *Thornton v. Southwest Detroit Hosp.*, 895 F.2d 1131, 1133 (6th Cir.1990) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463

U.S. 1, 27-28, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)). "[The well-pleaded complaint] rule provides that 'federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.' " *Loftis v. United Parcel Serv., Inc.*, 342 F.3d 509, 514 (6th Cir.2003) (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987)). "[T]he party who brings a suit is master to decide what law he will rely upon." *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25, 33 S.Ct. 410, 57 L.Ed. 716 (1913). Since the plaintiff is the "master of his complaint," the fact that a claim could be stated under federal law does not prevent him from stating it under state law only. *Alexander v. Electronic Data Sys. Corp.*, 13 F.3d 940, 943 (6th Cir.1994).

The plaintiff insists that his complaint contained "only a state law tort claim," Br. of Appellant at 25, and he assiduously avoided bringing an action under federal law, as was his choice. His reference to federal statutes was not intended to suggest that federal law provided him a right to relief, he says, but they were mentioned only as establishing the public policy that the defendant's actions violated. Consequently, he argues, citing *Franchise Tax Bd.*, "a federal court does not have original jurisdiction over a case in which the complaint presents a state-law cause of action." 463 U.S. at 10, 103 S.Ct. 2841.

However, the "arising under" gateway into federal court in fact has two distinct portals. The well-worn thoroughfare admits litigants whose causes of action are created by federal law, that is, where federal law provides a right to relief. *See American Well Works Co. v. Layne & Bowler Co.*, 241

U.S. 257, 260, 36 S.Ct. 585, 60 L.Ed. 987 (1916) (holding that "[a] suit arises under the law that creates the cause of action"); *see also Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 808, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986) (observing that the " 'vast majority' of cases that come within [section 1331's] grant of jurisdiction are covered by Justice Holmes' statement [in *American Well Works*]"). But it is the path less traveled that concerns us today. Recently, the Supreme Court reaffirmed its long-standing, albeit controversial, interpretation of 28 U.S.C. § 1331 "that in certain cases federal question jurisdiction will lie over state-law claims that implicate significant federal issues." *Grable & Sons*, 125 S.Ct. at 2367. The knotty issue presented here is whether this is one of those "certain cases" in which federal jurisdiction is appropriate. Because there is no " 'single, precise, all-embracing' test for jurisdiction over federal issues embedded in state-law claims between non-diverse parties," *id.* at 2368 (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 821, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988) (Stevens, J., concurring)), the answer requires us to examine the factors bearing on the substantiality *551 of the federal question involved against the background of the federal-state division of responsibility for adjudicating disputes. We have engaged in the "selective process which picks the substantial causes out of the web and lays the other ones aside," *Gully v. First Nat'l. Bank in Meridian*, 299 U.S. 109, 118, 57 S.Ct. 96, 81 L.Ed. 70 (1936), and conclude that the plaintiff's public policy claim here is one of the causes that ought to be laid aside.

In deciding this case, we address a question recognized as remaining undecided in this Circuit in *Long v. Bando*

Manufacturing of America, Inc., in which this court settled a slightly different jurisdictional issue. In that case, the plaintiff filed a state court action for wrongful employment termination in violation of public policy, but the source of the policy allegedly violated had its foundation in both federal and state law. This court noted that "the question whether a wrongful discharge claim based on federal public policies invokes federal jurisdiction appears to be one of first impression in this circuit." 201 F.3d at 760. However, the court based its holding that the complaint did not present a substantial federal question, and therefore "did not invoke the federal courts' 'arising under' jurisdiction," on the ground that the complaint "put forth alternate state and federal policies to support [the plaintiff's] state-law wrongful discharge claim." *Id.* at 760-61 (following *Christianson*, 486 U.S. at 809-10, 108 S.Ct. 2166).

The plaintiff has attempted to bring his case within *Long's* scope by amending the complaint to include state law as an additional public policy source. However, "[t]he existence of subject matter jurisdiction is determined by examining the complaint as it existed at the time of removal." *Harper v. AutoAlliance Int'l., Inc.*, 392 F.3d 195, 210 (6th Cir.2004). It is that unadorned snapshot of the pleadings that we examine in order to decide whether the case "arises under" federal law. Subsequent amendments are permitted, of course; but if an amendment eliminates all the federal claims, remand becomes a discretionary decision for the district court under 28 U.S.C. § 1367(c). *Id.* at 211-12 (citing *Taylor v. First of Am. Bank-Wayne*, 973 F.2d 1284, 1288 (6th Cir.1992) (observing that in such cases dismissal is not mandatory because supplemental jurisdiction "is a doctrine of discretion,

not of plaintiff's right")). Therefore, we will confine our examination to the original complaint.

The plaintiff's complaint in this case, in its original iteration, identifies only federal law as the source of the public policy allegedly violated, and it is on that basis that we consider the jurisdictional issue. The plaintiff alleged that his termination violated public policy found in 18 U.S.C. § 287, which punishes as a felony the act of knowingly presenting "false, fictitious, or fraudulent" claims to the United States; and in 31 U.S.C. § 3729, which creates civil penalties in favor of the United States against persons who present false claims or attempt to defraud the government. Neither of these two statutes creates private rights of action to enforce individual rights, although there is a mechanism within the False Claims Act that allows private persons to initiate civil actions on behalf of the government, *see* 31 U.S.C. § 3730, and the FCA protects whistleblowers only to the extent that they follow the Act's procedures. *See* § 3730(h). The absence of a private right of action might seem to be dispositive in light of the Supreme Court's holding in *Merrell Dow*, in which the Court withheld federal jurisdiction in a state tort action alleging negligence based in part on the misbranding of a drug in violation of federal law:

> We conclude that a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising

> under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

478 U.S. at 817, 106 S.Ct. 3229.

However, in *Grable & Sons*, the Supreme Court cautioned that *Merrell Dow* cannot be read so simply. "*Merrell Dow* should be read in its entirety as treating the absence of a federal private right of action as evidence relevant to, but not dispositive of, the 'sensitive judgments about congressional intent' that § 1331 requires." *Grable & Sons*, 125 S.Ct. at 2370. According to *Grable & Sons*, "arising under" jurisdiction for state-law claims based on an interpretation of federal law can be found in section 1331 only when there is "not only a contested federal issue, but a substantial one"; and "federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331." *Id.* at 2367.

A "substantial" federal question involves the interpretation of a federal statute that actually is in dispute in the litigation and is so important that it "sensibly belongs in federal court." *Id.* at 2368. In *Grable & Sons*, the Court found that the interpretation of a provision of the Internal Revenue Code governing notice to land owners whose property is to be sold to satisfy delinquent taxes presented a substantial federal question in a title dispute action removed from state court. The meaning of that statute was genuinely in dispute, and the Court found that the government's interest in fixing the means of collecting delinquent taxes justified "the experience, solicitude, and hope of uniformity that [resort to] a federal forum offers on federal issues." *Id.* at 2367.

In contrast, the meaning of the two statutes cited by the plaintiff is not in serious dispute in this case. It hardly can be disputed that submitting fraudulent claims to the federal government would contravene national policy. Nor can it be gainsaid that government contractors ought not commit felonies or defraud their customer, or that whistleblowers should not be punished for exposing their employer's fraud. Marine Mechanical does not dispute these points. Moreover, Congress' withholding a private right of action from these statutes is an important signal to its view of the substantiality of the federal question involved. As the Supreme Court observed with respect to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.*:

> We simply conclude that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently "substantial" to confer federal-question jurisdiction.

Merrell Dow, 478 U.S. at 814, 106 S.Ct. 3229. We view the statutes cited by the plaintiff in the same light.

The Ninth Circuit reached the same conclusion in *Campbell v. Aerospace Corp.*, 123 F.3d 1308 (9th Cir.1997), when it rejected the argument that resort to the Federal False Claims Act as a source of public policy justified the exercise of federal jurisdiction over a state wrongful termination action. The court noted the obvious federal interest in

protecting whistleblowers and exposing fraud against the government, but found those interests "sufficiently advanced through the federal scheme," which consisted of *qui tam* actions under the FCA and protection of whistleblowing employees who pursue such actions. *Id.* at 1315. The court reasoned that the FCA's procedures augured against finding a substantial federal question in a state action relying on the FCA as a source of public policy because a state-law tort claim so grounded would circumvent the procedures and limitations of the FCA, and a contrary finding would open a "back door" into federal court for what essentially was a state tort action. Those factors led the court to "find no compelling federal judicial interest in embracing this case as a federal question." *Ibid.*

Likewise, we conclude that the reference in the plaintiff's complaint to the federal statutes cited as a source of public policy does not create a substantial federal question in this case.

Next, and perhaps more importantly, we find that accepting jurisdiction of this state employment action would be disruptive of the sound division of labor between state and federal courts envisioned by Congress. We address this issue because "the presence of a disputed federal issue and the ostensible importance of a federal forum are never necessarily dispositive; there must always be an assessment of any disruptive portent in exercising federal jurisdiction." *Grable & Sons*, 125 S.Ct. at 2368.

In *Grable & Sons*, the Court saw little danger in accepting jurisdiction of the state title dispute in that case because it

would "portend only a microscopic effect on the federal-state division of labor." *Id.* at 2368. In contrast, recognizing a substantial federal question when a violation of federal law furnished the basis for a negligence claim, as in *Merrell Dow*, would severely impact the "the concern for 'practicality and necessity' that *Franchise Tax Board* advised for the construction of § 1331 when jurisdiction is asserted because of the presence of a federal issue in a state cause of action." *Merrell Dow*, 478 U.S. at 811-12, 106 S.Ct. 3229. Accepting jurisdiction in that case "would have attracted a horde of original filings and removal cases raising other state claims with embedded federal issues" and likely would "have heralded a potentially enormous shift of traditionally state cases into federal courts." *Grable & Sons*, 125 S.Ct. at 2370-71.

We view the circumstance presented by this case much closer to the concern expressed over the *Merrell Dow* template than the one staked out in *Grable & Sons*. Employment litigation is a common occurrence in both federal and state courts. Federal legislation has provided access to the federal courts by aggrieved employees under specifically delineated circumstances, *e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*; Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*; Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, but our perception is that the bulk of the judicial business in the United States in this area is conducted by the state courts. This balance would be upset drastically if state public policy claims could be converted into federal actions by the simple expedient of referencing federal law as the source of that

public policy. We believe such a dramatic shift would distort the division of judicial labor assumed by Congress under section 1331.

Given these concerns, and following the analytical methodology laid down by recent Supreme Court precedent, we hold that a state-law employment action for wrongful termination in violation of federal public policy does not present a substantial federal question over which federal courts may exercise "arising under" jurisdiction under 28 U.S.C. § 1331. Because there would be no original subject matter jurisdiction over non-diverse parties, the district court erred when it concluded it had removal jurisdiction and twice denied the plaintiff's motion to remand.

III.

For the reasons stated, we **VACATE** the district court's judgment, **REVERSE** the orders denying the motions to remand, and **REMAND** this matter with instructions to remand the case to the Ohio state court from where it was removed.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION DATED OCTOBER 21, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:02 CV 1314

JOHN T. EASTMAN,

Plaintiff,

v.

MARINE MECHANICAL CORP.,

Defendant.

MEMORANDUM OPINION AND ORDER

This case is before the Court on Defendant's Motion for Summary Judgment. Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant Marine Mechanical Corporation, has petitioned the Court for summary judgment dismissing Plaintiff, John Eastman's claim for wrongful discharge in violation of public policy. (ECF #32). For the reasons set forth below, Defendant's motion is granted.

Appendix B

Procedural and Factual Background[1]

Plaintiff John Eastman ("Plaintiff") filed the instant action against his former employer, Defendant Marine Mechanical Corporation ("MMC") in the Cuyahoga County Court of Common Pleas. The case was removed to federal court on July 9, 2002. (ECF #1). The First Amended Complaint was filed on August 6, 2002. (ECF #6). Mr. Eastman has raised a single tort for wrongful discharge in violation of public policy. (Opp. at 1), based on his belief that he was fired "because he: (1) notified his superiors and "MMC" of certain material deficiencies in MMS's compliance with contractual obligations" and (2) refused to falsely certify parts that he believed were deficient. (Opp. at 1). The First Amended Complaint lists several potential public policies which could support a public policy claim, including the Federal False Claims Act, 31 U.S.C. § 3729; the Ohio Whistleblower Act, O.R.C. § 4113.52; an Ohio criminal falsification O.R.C. § 2921.13; a federal criminal false claims statute, 18 U.S.C. § 287; and the common law tort of fraud.

Mr. Eastman began work with TRW, Inc. (a corporate predecessor of Defendant in 1984. His employment with MMC began in 1994 and lasted until his termination on September 27, 2001. At the time of his discharge, Mr. Eastman held the title of Manager of Materials Engineering. He had received favorable evaluations throughout the course

1. The factual summary is based upon the parties' statements of facts. Those material facts which are controverted and supported by deposition testimony, affidavit, or other evidence are stated in a light most favorable to Plaintiff, the non-moving party.

of his career with MMC. A significant portion of Plaintiff's job involved identifying, analyzing and solving problems related to product quality and ensuring compliance with various specifications and contract requirements. In November of 2000, MMC implemented a new organizational structure resulting in the promotion of one of Mr. Eastman's former subordinates into a position which Mr. Eastman had also applied for. This promotion made Mr. Centa, Mr. Eastman's supervisor.

Following these changes, Mr. Eastman prepared a memorandum detailing mistakes made and improper testing conducted by other employees, including Mr. Centa. MMC investigated these allegations internally and determined that they lacked merit. MMC investigators alleged that Mr. Eastman had improperly sought to discredit others, particularly Mr. Centa and he was issued a warning. Nearly five months later, Mr. Eastman again raised allegations about improper testing methods and other misrepresentations. MMC again investigated the allegations and found them to be meritless. MMC again alleged that Mr. Eastman had improperly sought to discredit other workers, including Mr. Centa. As a result, MMC terminated Mr. Eastman's employment

Appendix B

Summary Judgment Standard

Summary judgment is appropriate when the court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden of showing the absence of any such "genuine issue" rests with the moving party:

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact.

Celotex v. Catrett, 477 U.S. 317, 323 (1986) (citing Fed. R. Civ. P. 56(c)). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. The court will view the summary judgment motion in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Summary judgment should be granted if a party who bears the burden of proof at trial does not establish an essential element of their case. *Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 941 (6th Cir. 1995) (citing *Celotex*, 477

U.S. at 322). Accordingly, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995) (citing *Anderson*, 477 U.S. at 252). Moreover, if the evidence presented is "merely colorable" and not "significantly probative," the court may decide the legal issue and grant summary judgment. *Anderson*, 477 U.S. at 249-50 (citations omitted). In most civil cases involving summary judgment, the court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict" *Id.* at 252.

Once the moving party has satisfied its burden of proof, the burden then shifts to the nonmover. The nonmoving party may not simply rely on its pleadings, but must "produce evidence that results in a conflict of material fact to be solved by a jury." *Cox v. Kentucky Dep't of Transp.*, 53 F.3d 146, 149 (6th Cir. 1995). Fed. R. Civ. P. 56(e) states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

The Federal Rules identify the penalty for the lack of such a response by the nonmoving party as an automatic grant of summary judgment, where otherwise appropriate, *Id.*

In sum, proper summary judgment analysis entails "the threshold inquiry of determining whether there is the need for a trial — whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250.

Analysis

The Sixth Circuit has held that under Ohio law, a plaintiff cannot state a claim for wrongful discharge in violation of public policy unless he or she is able to establish a violation of the underlying source of that policy. *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559 (6th Cir. 2003). Under Ohio law "when the employee's discharge is not actionable under the law that establishes the 'clear public policy,' the companion common-law claim for relief likewise fails as a matter of law." *Id.* at 568-69 (citations omitted). Plaintiff has not set forth sufficient facts to establish a violation of any of the underlying statutes or other sources of policy upon which he has based his public policy claim.

Plaintiff has provided no evidence that he assisted in any way with an actual legal action that had been filed or reasonably could have been filed, as required for a federal False Claims Act violation. *See, McKenzie v. Bell South Telecommunications, Inc.*, 219 F.3d 508, 516-17 (6th Cir. 2000)(holding no FCA violation where plaintiff raised complaints internally but where legal action was not a reasonable or distinct possibility); 31 U.S.C. § 3729 (prohibiting the discharge of an employee because of lawful acts done in furtherance of an action filed or to be filed under

the Act). In addition, the Ohio Supreme Court has stated that a plaintiff may not premise a public policy claim for wrongful discharge upon a statute that provides its own remedial scheme. *See*, *Wiles v. Medina Auto Parts*, 96 Ohio St. 3d 240 (2002). This Court has also dismissed a public policy claim premised upon statute that provided its own remedial scheme. *See*, *Wyckoff v. Forrest City Auto Parts* Co., 916 F. Supp. At 686. The Federal False Claims Act provides a remedial scheme for employees who have been discharged due to protected activity. Thus, if Plaintiff believed that the Defendant had violated the Federal False Claims Act by discharging him, he should have brought a action directly under the FCA rather than as a public policy claim.

Plaintiff has not even alleged compliance with the Ohio Whistleblower's Act's statute of limitations. The Act requires that Plaintiff's claims be raised within 180 days of the alleged retaliatory action. Ohio courts, therefore, have held that a public policy claim based on the Whistleblower's Act cannot be raised unless the 180 day filing period has been complied with. *See*, *e.g.*, *Davidson v. BP America, Inc.*, 125 Ohio App. 3d 643, 651 (Cuyahoga Cty. 1997). It is undisputed that this claim was filed more than 180 days after the alleged retaliatory action, and that no Whistleblower's Act claim has been made, therefore, Plaintiff has not met the timing requirements for the Whistleblower's Act or for a public policy claim based upon the Whistleblower's Act.

Further, the Plaintiff has made no showing, or attempted showing that the Defendants have actually violated any of the criminal statutes he has cited as possible bases for his public policy claims, or that the elements of common law

fraud have been met. Accordingly, a public policy claim based on these policies cannot stand. In his Motion in Opposition to the Defendant's Motion for Summary Judgment, Mr. Eastman implicitly concedes that he is not able to establish the elements of any of the underlying policies. (Opp. at 1-2). Consequently, under both federal and Ohio law, Plaintiff's claim for wrongful discharge in violation of public policy must fail, as a matter of law.

Conclusion

For the reasons set forth above, Defendant's Motion for Summary Judgment is granted. Pursuant to Fed. R. Civ. Pro. 56, Plaintiffs First Amended Complaint is hereby dismissed.

IT IS SO ORDERED.

s/ Donald C. Nugent
DONALD C. NUGENT
United States District Judge

DATED: October 21, 2003

APPENDIX C — STATUTES INVOLVED

18 U.S.C. § 287

Section 287. False, fictitious or fraudulent claims

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

31 U.S.C. § 3729

Section 3729. False claims

(a) Liability for Certain Acts. — Any person who —

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; . . .

* * *

is liable to the United States Government for a civil penalty of not less than $5,000 and not more

than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . .

* * *

(c) Claim Defined. — For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

* * * *

31 U.S.C. § 3730

Section 3730. Civil action for false claims

* * *

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in

furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

(3)

No. 05-1461

FILED
JUL 11 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the
Supreme Court of the United States

MARINE MECHANICAL CORPORATION,
Petitioner,

v.

JOHN T. EASTMAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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Questions Presented for Review

Whether Respondent's complaint filed in the state court of Ohio was properly removed to the United States District Court.

Whether Respondent's claims for wrongful termination in violation of public policy are claims "arising under" the Constitution or laws of the United States.

Parties

The caption of the Petitioner's Petition contains the names of all parties to this action.

Disclosure Statement

Respondent is an individual.

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Statutory Provisions at Issue

This case involves 28 U.S.C. § 1331, which provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Statement of the Case

Respondent agrees with the majority of the statements made in Petitioner's Statement of the Case. However, Petitioner's Statement of the Case incorrectly asserts that "[Respondent] premised his wrongful discharge claim solely upon two federal statutes, 18 U.S.C. § 287 and 31 U.S.C. § 3729." Petition at page 3. Respondent's Complaint, which was filed in an Ohio state court, contained a single cause of action for wrongful discharge in violation of public policy. This claim arises under Ohio common law. *Greeley v. Miami Valley Maint. Contractors, Inc.*, 49 Ohio St.3d 228, 551 N.E.2d 981 (1990). Respondent's claim does not arise under federal law.

Reasons for Denying the Petition

Respondent chose to file his claim in an Ohio state court. His single claim of employment discrimination arises under the common law of Ohio. The state court will not be required to determine any question of federal law. The case was thus improvidently removed from the state court to a federal court as there was never federal jurisdiction.

The type of "federal question" or "arising under" jurisdiction described in 28 U.S.C. § 1331 is governed by the well-pleaded-complaint rule. This "rule" holds that "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987). Federal jurisdiction is present when the complaint invokes federal law as the basis for relief. Federal jurisdiction is not present when the facts alleged in support of a state law claim might also support a federal claim. "The [well-pleaded-complaint] rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Id. See also The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22 (1913). "[A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution." *Louisville & N. R. Co. v. Mottley*, 211 U.S. 149 (1908). "As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim." *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1 (2003).

Respondent filed his one-count wrongful discharge complaint in the Cuyahoga County (Ohio) Court of Common Pleas. In his complaint, Eastman alleged that Petitioner's decision to discharge him violated the public policy of the

State of Ohio. These "public policy" employment claims are a part of the common law of Ohio, and were first recognized by the Ohio Supreme Court in *Greeley v. Miami Valley Maint. Contractors, Inc.*, 49 Ohio St.3d 228, 551 N.E.2d 981 (1990). Under Ohio law, a "public policy" claim consists of four elements:

1. [A] clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law;

2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy;

3. The plaintiff's dismissal was motivated by conduct related to the public policy;

4. The employer lacked overriding legitimate business justification for the dismissal.

Collins v. Rizkana, 73 Ohio St.3d 65, 69; 652 N.E.2d 653 (1995).

In his initial complaint filed in state court, Respondent cited the federal False Claims Act as the source of public policy he was required to plead under state law. Petitioner removed the case to the United States District Court for the Northern District of Ohio, claiming that Respondent's mere mention of the federal False Claims Act in his complaint invoked federal question jurisdiction. The District Court refused to remand the case to state court and eventually granted Petitioner's motion for summary judgment. Pet. App. B.

This Court recently concluded that a two-part test is to be used when deciding whether a federal court's "arising under" jurisdiction has been invoked: (1) the actual existence in the case of a "contested" and "substantial" federal issue "indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum," and (2) where the exercise of federal court jurisdiction will be "consistent with congressional judgment about the sound division of labor between state and federal courts. . . ." *Grable & Sons Metal Prod. Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005).

Grable did not alter or weaken the holding in *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804 (1986) that "a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim 'arising under the Constitution, laws, or treaties of the United States.'"

The Court of Appeals correctly concluded that neither prong of *Grable*'s two-part test had been satisfied when Respondent filed his case in the state court. The Court of Appeals found there to be no "contested" or "substantial" issue as to whether the federal False Claims Act does or should prohibit the submission of false or fraudulent claims to the government. *Eastman v. Marine Mechanical Corporation*, 438 F. 3d 544, 552 (6th Cir. 2006). The Court of Appeals also concluded that the absence of a private right of action available to Respondent under the False Claims Act "is an important signal to [Congress'] view of the substantiality of the federal question involved." *Id.* The Court of Appeals cited with approval the following language from this Court's *Merrell Dow* opinion:

> We simply conclude that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction.

Id., citing *Merrell Dow*, 478 U.S. 804, 814 (1986).

As the master of his complaint, Respondent chose to file his claim arising under Ohio common law in an Ohio state court. No federal claim was asserted by Respondent in his state court complaint. No claim "arising under" the Constitution or federal law was ever asserted by Respondent. The Court of Appeals correctly concluded that there was no federal court jurisdiction over Respondent's claims.

Conclusion

For the reasons stated above, Respondent John T. Eastman respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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